

**IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA**

MARY K. BOLEY, et al.,

Plaintiffs,

v.

UNIVERSAL HEALTH SERVICES, INC., et al.,

Defendants.

Civil Action No. 2:20-cv-02644-MAK

**DEFENDANTS' MOTION TO EXCLUDE
PROPOSED EXPERT TESTIMONY OF KELLY DRISCOLL**

Universal Health Services, Inc. and the Universal Health Services, Inc. Retirement Plans Investment Committee (together, "Defendants") hereby move to exclude the proffered opinions and proposed testimony of Kelly Driscoll, whom Plaintiffs propose as an expert witness in this matter. Driscoll's proffered opinions and proposed testimony are severely flawed and do not meet the requirements of Federal Rule of Evidence 702. Driscoll's opinion concerning the objective prudence of the Fidelity Freedom Target Date Funds ("Freedom Funds") is unreliable for three reasons: (1) she lacks the experience and expertise necessary to qualify her as an expert in investments; (2) she fails to conduct any independent analysis to assess the prudence of the Freedom Funds; and (3) her opinion relies heavily on popular press articles that she has taken no steps to independently evaluate. Driscoll's procedural prudence opinion is similarly unreliable for three reasons: (1) her opinion is replete with legal conclusions and simply seeks to regurgitate Plaintiffs' litigation narrative under the guise of expert testimony; (2) her opinion is speculative and conclusory, and she fails to explain how or why the alleged deficiencies in the Committee's process resulted in the allegedly imprudent offering of the Freedom Funds; and (3) she has refused to identify her clients who have supposedly applied the fiduciary process for which she

advocates, thereby preventing Defendants from assessing the validity of her opinion in its application. For the reasons articulated herein and for the reasons provided in the accompanying Memorandum in Support of this Motion, Driscoll's proffered opinions and proposed testimony do not meet the requirements of Federal Rule of Evidence 702. Accordingly, Driscoll's opinions and testimony should be excluded.

WHEREFORE, Defendants respectfully request that the Court grant their motion and exclude Ms. Driscoll's opinions and testimony in this matter.

* * *

Pursuant to this Court's Policies and Procedures, Defendants conferred with Plaintiffs on the filing of this Motion. Plaintiffs do not consent to the filing of this Motion. Plaintiffs provided the following summary of their anticipated grounds for opposing this Motion:

With respect to Defendants' anticipated motion to exclude Ms. Driscoll's opinions, we oppose the motion as the grounds articulated for her exclusion mischaracterize Ms. Driscoll's opinions and otherwise go to the weight rather than the admissibility of her opinions. Ms. Driscoll does not offer an ultimate opinion on the objective prudence of the challenged investments, but rather offers opinions that are reliable and will be helpful to the court in reaching determinations concerning the prudence of the challenged investments. Ms. Driscoll applies common industry principles and her significant experience as it relates to Defendants' selection and retention of the challenged investments; despite Defendants' anticipated argument otherwise, there is no requirement that any expert employ a certain methodology or specific metrics (let alone recreate metrics that appear in the record) in carrying out their analysis. Similarly, Ms. Driscoll made clear in her report and deposition that she was not offering legal opinions, but instead that relevant legal developments inform industry custom and practice. In fact, much of the discussion of caselaw during Ms. Driscoll's deposition was the result of counsel presenting Ms. Driscoll with various judicial opinions and asking for her interpretation of the same, without reference to Ms. Driscoll's report. In addition, that Ms. Driscoll declined to share details of certain confidential client arrangements from her prior role at State Street did not prevent counsel from determining the bases of her opinions or testing her credibility.

Dated: September 7, 2022

Respectfully submitted,

/s/ Brian T. Ortelere

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CERTIFICATE OF SERVICE

I, Brian T. Ortelere, hereby certify that on this 7th day of September, 2022, a true and correct copy of the foregoing was electronically filed with the Clerk of the Court using the CM/ECF system, which will send a notice of electronic filing to all counsel of record for this case, and which is available for viewing and downloading from the CM/ECF system of the U.S. District Court for the Eastern District of Pennsylvania.

/s/ Brian T. Ortelere
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